

70637-3

70637-3

NO. 70637-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Manuel La Rosa, DDS,

Respondent,

v.

Northwest Wind Power LLC and Ted Mr. Thomas,

Appellants.

Brief of Respondent

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I. INTRODUCTION

For months Ted Mr. Thomas (“Mr. Thomas”) and Northwest Wind Power LLC (“NWP”) (collectively “Defendants”) willfully disregarded Washington court rules and two court orders explicitly compelling full and complete discovery. The trial court repeatedly and expressly considered and imposed lesser sanctions, but after more than seven months of stonewalling, delay, and obfuscation, the trial court properly exercised its discretion and entered default judgment against Defendants.

As found by the trial court, Defendants engaged in a pattern of willful disregard of court orders and the rules of discovery. In response to basic contention interrogatories issued in November 2012 and a subsequent motion to compel, Defendants did not respond at all. After a first order compelling “full and complete” discovery responses and awarding \$250 in sanctions in February 2013, Defendants provided written answers by Mr. Thomas but not by NWP, produced no documents, and attempted to deceive the trial court by claiming that their travel schedule had precluded them from producing documents. In fact Defendants were present defending a similar products liability claim. In response to a second order compelling production of all non-privileged, responsive documents and awarding additional monetary sanctions in April 2013, Defendants provided only 18 pages of documents. Defendants

also made no effort to pay even the first monetary sanction of \$250 or to supplement their discovery answers. Finally, in response to a motion for default judgment heard in July 2013, more than seven months after discovery was issued and less than two months before the discovery cutoff, Defendants deceptively argued that the 18 pages produced represented all documents in their care, custody, and control. As with their travel-schedule excuse, this unsupported fabrication is demonstrably false and was properly rejected by the trial court.

Among other things, Defendants failed to produce any documents in the following categories, and their claim that they produced all documents in their care, custody, and control is demonstrably false:

RFP	Documents Produced	Excuse Demonstrably False Because...
Any customer list identifying NWP's customers from the past five years. (RFP No. 14).	None	Defendants admit that they have such a list but have failed to produce it.
Any documents relating to any claims or complaints by any other wind turbine purchaser. (RFP No. 15).	None	Defendants admit that other claims and complaints exist and must have copies. Defendants are involved in other similar lawsuits but have failed to produce any responsive documents.

Any advertising materials. (RFP Nos. 16, 22).	None	Advertising materials were readily available on NWP's website at the same time that Defendants claimed they did not have any advertising materials in their care, custody, and control.
Any correspondence (apart from invoices) concerning the subject matter of the lawsuit or between Defendants and Dr. La Rosa (RFP Nos. 17, 18).	None	Mr. Thomas on behalf of NWP sent and received multiple emails to and from Dr. La Rosa. Defendants produced none and similarly produced no emails concerning subject matter of lawsuit (<i>e.g.</i> emails with subcontractors).

Defendants have shown repeated and willful disregard for the integrity of the court. The trial court properly exercised its discretion in entering default judgment. Appellants' arguments to this Court lack merit and tellingly omit any reference to the controlling rule, CR 37. The judgment of the trial court should be affirmed.

II. STATEMENT OF THE ISSUES

1. Did the trial court correctly exercise its discretion in entering default judgment after Defendants willfully disregarded both the court rules and two court orders compelling responses for more than seven months?

2. Should the Court award Dr. La Rosa his attorney fees for responding to this frivolous appeal?

III. STATEMENT OF THE CASE

A. **Based on Misrepresentations by Mr. Thomas and NWP, Dr. La Rosa Purchased a Defective Wind Turbine from NWP.**

Based on representations by NWP and Mr. Thomas, NWP's principal, Manual La Rosa DDS ("Dr. La Rosa") purchased a wind turbine from NWP to generate electricity for his home. CP 201. The representations by NWP and Mr. Thomas included a 5-year "No-Maintenance" warranty as well as ratings regarding the amount of electricity that would be produced by the wind turbine. CP 202.

The wind turbine is defective and has never generated more than a nominal amount of electricity, which Mr. Thomas admitted throughout 2011. CP 202-03, 208-215. ("There was a piece of equipment we did not have, that we needed for correcting your system."). Dr. La Rosa filed his complaint in this matter in mid-2012 based on the defective performance of the wind turbine and the related misrepresentations by Mr. Thomas and NWP. CP 1-5. Among other things, Dr. La Rosa alleged a violation of the Consumer Protection Act ("CPA"), Chapter 19.86 RCW. *Id.*

Other purchasers have filed suit against Mr. Thomas and NWP based on similar issues. *E.g.* Summons and Complaint, *Osborn v. Mr. Thomas, et. al.*, No. 11-2-08871-3 (Snohomish County Superior Ct., Oct. 12, 2011) (misrepresentations regarding wind turbine); Notice of Small Claim, *Kaech v. Thomas, et al.* No. 133-1735 (King County District Court,

Nov. 15, 2013) (misrepresentations and defective wind turbine performance); Amended Complaint, *Marcinko v. Northwest Windpower LLC, et al.*, No. 13-2-01175-3 (Kitsap County Superior Ct., July 11, 2013) (defective construction); Amended Complaint, *Varrus L.L.C. v. Mr. Thomas, et al.*, No. 12-2-39173-4 SEA (King County Superior Ct., Dec. 11, 2012) (after payment of \$18,000 deposit, no work started or deposit returned); Complaint, *Waymire v. Home Energy USA, LLC, et al.*, No. 14-2-00128-9 (Grant County Superior Ct., Jan. 21, 2014) (work unfinished). It stands to reason that these lawsuits represent only a fraction of the claims against Mr. Thomas and NWP.¹

As explained in more detail below, Defendants have admitted in their discovery answers that claims and complaints other than Dr. La Rosa's exist but have never identified them (including any of those listed above) or produced a single responsive document, despite direct discovery requests and two orders compelling them to do so. CP 119, 194, 225.

¹ Presumably not every claim has been made a lawsuit. See *Kaech v. Thomas, supra*, filed in November 2013, and based on a 2010 contract. Other lawsuits against Mr. Thomas and NWP also exist which could foreseeably give rise to related claims by wind turbine purchasers. E.g. Complaint, *PCS Structural Solutions, Inc. v. Thomas, et al.*, No. 08-2-13161-1KNT (King County Superior Ct., Apr. 17, 2008) (failure to pay for engineering services); Complaint for Debt, *Ala. Cascade Fin. Servs. v. NW Wind Power, LLC, et al.*, No. 13-2-26101-4KNT (King County Superior Ct., July 15, 2013) (failure to pay for equipment rental).

B. After Mr. Thomas and NWP Failed to Respond to Basic Contention Interrogatories and Requests for Production, the Court Ordered Full and Complete Discovery Responses.

On November 16, 2012, Dr. La Rosa served each Defendant with a set of basic contention interrogatories and requests for production. CP 14-23. Neither Mr. Thomas nor NWP provided any response. CP 11-13.

On January 30, 2013, when discovery was long overdue, Dr. La Rosa filed a motion to compel based on Mr. Thomas' and NWP's failure to respond whatsoever to his discovery requests. *Id.* Neither Mr. Thomas nor NWP responded to the motion. CP 24-26.

On February 15, 2013, the court granted Dr. La Rosa's motion and entered an order specifically directing NWP and Mr. Thomas to provide "full and complete answers" to Dr. La Rosa's discovery requests within five days, and to pay Dr. La Rosa \$250.00 for the costs incurred in bringing the motion to compel. CP 27-29. Defendants have never paid the \$250 ordered and, as explained in more detail below, have never provided full and complete answers to the discovery requests. CP 223.

C. After Mr. Thomas and NWP Did Not Produce Any Documents in Response to the Court's First Order Compelling, the Trial Court Entered a Second Order Compelling Production of "All" Nonprivileged, Responsive Documents.

On March 7, 2013, Dr. La Rosa's counsel sent Defendants' attorney, Matthew King, a copy of the court order compelling discovery and awarding expenses and requested full and complete discovery

answers. Mr. King indicated that answers and documents would be forthcoming, but none were received. CP 117-18, 166-69.

On April 4, 2013, Dr. La Rosa's counsel emailed Mr. King to again request responses to discovery. On April 4 and 5, 2013, Mr. King for the first time emailed written discovery answers, from defendant Mr. Thomas only. Although the answers refer to "documents produced," Defendants produced no documents. In addition, Mr. King indicated that he had not yet received any documents from his clients, despite the court's February order compelling his clients to provide complete discovery responses within five days. As a result, Mr. King was unable to provide a date certain whereby the documents would be available for inspection. *Id.*

Dr. La Rosa brought a second motion to compel in April 2013. CP 30-34. In response, Mr. Thomas and NWP admitted that they had not produced any documents but argued that they had been unable to do so (for five months) because of their busy travel schedule. This excuse was demonstrably false as shown by court records. Specifically, in a remarkably similar case against Defendants involving the sale of another defective wind turbine system, Defendants confessed to judgment. After Defendants failed to pay, supplemental proceedings were held in Snohomish County Superior Court. Mr. Thomas and Mr. King attended those supplemental proceedings together on March 12, 2013 – during the

same time that Defendants were supposedly too busy travelling to produce any responsive documents. CP 118, 172, 174-178.

On April 17, 2013, the court granted Dr. La Rosa's second motion to compel. CP 105-107. The court specifically found Defendants' discovery abuses to be willful or deliberate and found that such abuses caused substantial prejudice to Dr. La Rosa. Consistent with its first order compelling, the court directed that Defendants provide "all non-privileged documents responsive to Plaintiff's First Interrogatories and Requests for Production ..." within ten business days of the order and that Defendants pay Dr. La Rosa his reasonable fees and costs incurred as a result of Defendants' intransigence in the amount of \$3,045.49, including the \$250 previously ordered. Finally, the court ordered that failure to comply with all of the terms of the court's second order compelling would result in automatic suspension of Defendants' defenses and affirmative defenses. The second order compelling was promptly served on Mr. King. CP 118-19.

D. Mr. Thomas and NWP Willfully Disregarded the Second Order Compelling Production.

Defendants did not comply with the court's first or second orders. In response to the second order, Defendants produced a mere fraction of responsive documents, only 18 pages, and did not pay Dr. La Rosa any of

the reasonable fees and costs awarded. CP 119-20. As outlined below, Defendants' production was patently insufficient and did not, as Defendants would baldly and deceptively claim, represent all of the documents in their care, custody, and control. CP 225.

Defendants did not produce any documents in the following categories.

1. Any documents relating to any of Defendants' defenses or affirmative defenses. (RFP Nos. 1-13, 20-21).
2. Any customer list identifying Northwest Wind Power's customers from the past five years. (RFP No. 14).
3. Any documents relating to any claims or complaints by any other wind turbine purchaser. (RFP No. 15).
4. Any advertising materials. (RFP Nos. 16, 22).
5. Any correspondence (apart from invoices) concerning the subject matter of the lawsuit. (RFP No. 17).
6. Any correspondence (apart from incomplete invoices) between Defendants and Dr. La Rosa. (RFP No. 18).
7. Any correspondence with any manufacturers or contractors. (RFP No. 19).

CP 119, 189-200. Defendants did not dispute this at the trial court and do not dispute it here. CP 225. Instead, they fantastically claim that they do not have any documents within these categories.

Defendants' claim is demonstrably false with respect to at least the second, third, fourth, fifth, and sixth category of documents. *See generally*

CP 226. Defendants admit that they have a customer list; they simply have refused to provide it. CP 194. Defendants admit that other claims and complaints exist, but without even identifying them, refused to produce any documents and instead stated only: “Lawsuits are public records. No other claims have been made.” CP 194; *see also* CP 172, 175-176. As discussed above, we now know that the number of lawsuits and informal claims and pending against Defendants when they provided this obstructionist answer was substantial. Despite referencing “documents produced” with respect to advertising, Defendants produced none. CP 195. At the same time, Defendants included a variety of advertising on NWP’s website. CP 231-235. Defendants produced no correspondence, apart from a few invoices, while Mr. Thomas regularly corresponded with Dr. La Rosa by email. CP 195-196, CP 202, 207-215.

E. After Defendants Rebuffed both Orders Compelling Responses the Court Entered Default Judgment.

On July 2, 2013, more than seven months after the discovery requests were served and two months before discovery cutoff, the trial court entered default judgment against Defendants under CR 37 based on their repeated disregard of the court’s orders and the rules of discovery. CP 109, 236-238. Consistent with its prior order, the trial court found: (1) Defendants willfully or deliberately disobeyed the discovery rules and the

court's two orders compelling; (2) Dr. La Rosa was substantially prejudiced, since Defendants failed to produce documents responsive to Plaintiff's basic contention interrogatories and requests for production; and (3) the court considered whether a lesser sanction would suffice but determined that none would. CP 236-38. In addition, the trial court took care to handwrite the following:

The court is convinced that Defendants' withholding of discovery is intentional and for the purpose of frustrating Plaintiff's attempt to seek redress for his claimed damages and that Defendants' conduct in discovery is materially damaging Plaintiff's claim and effort to resolve his claims in court in conformance with court rules.

Id. (underline added).

F. On Appeal, Defendants Continue to Ignore Court Rules.

After filing their notice of appeal from the default judgment, Defendants have continued to ignore court rules. The designation of clerk's papers was due August 14, 2013. When Defendants ignored that deadline, the Court Administrator/Clerk set a motion to dismiss for September 20, 2013. When Defendants ignored that deadline, the Court Administrator/Clerk set a hearing to dismiss for October 25, 2013.

Defendants finally filed their designation of clerk's papers on September 24, 2013, making their opening brief due November 8, 2013. RAP 10.2(a). When Defendants failed to meet that deadline, the Court Administrator/Clerk set a third hearing to dismiss for January 3, 2014.

Defendants then, without serving Dr. La Rosa by email or otherwise, filed a motion for extension of time until February 1, 2014, which was granted. Defendants then filed their opening brief on February 4, 2014 — a full three days late — and again without serving Dr. La Rosa.

IV. SUMMARY OF ARGUMENT

After duplicative issues are consolidated, Defendants' brief alleges five errors: (1) no findings of fact were entered; (2) Defendants' seven months of discovery violations were not willful; (3) because trial could still occur, Dr. La Rosa was not materially prejudiced by Defendants' discovery abuses; (4) lesser sanctions "would be the appropriate sanction for this discovery non-compliance;" and (5) the trial court's entry of default judgment following two orders to compel violated Defendants' due process rights. Appellant's Brief 5, 16.

The first four issues are unsupported by any argument and should be disregarded. They also lack any merit.

With respect to the fifth issue, Defendants' argument likewise lacks any merit. Defendants fail to cite CR 37 or controlling case law which states due process is satisfied where the court finds, as it did here, that the discovery violations were willful and resulted in substantial prejudice. The trial court correctly exercised its discretion and entered default judgment.

V. ARGUMENT

A. This Court Reviews Discovery Sanctions for a Clear Abuse of Discretion.

“Trial courts need not tolerate deliberate and willful discovery abuse.” *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 576, 220 P.3d 191, 194 (2009). Rather, where the court finds that the discovery abuse was willful or deliberate, resulting in substantial prejudice to the other party’s ability to prepare for trial, and that a lesser sanction would not suffice, CR 37(b)(2) and (d) expressly authorize the trial court to enter default judgment. *Id.* at 584; *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324, 54 P.3d 665 (2002).

This is exactly what happened here. After months of noncompliance the trial court correctly found that Defendants had deliberately and willfully failed to provide documents responsive to Dr. La Rosa’s basic discovery requests, that the failure substantially prejudiced Dr. La Rosa’s ability to prepare for trial, and that lesser sanctions (which had already been attempted) would not suffice.

This Court’s review of the trial court’s order is exceedingly limited. A trial court exercises “broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed absent a clear abuse of discretion.” *Magana*, 167 Wn.2d at 582 (quotation omitted). An abuse of discretion exists only where the trial

court's order "is manifestly unreasonable or based on untenable grounds," which occurs only if the trial court "relies on unsupported facts or applies the wrong legal standard;" or if the court "adopts a view that no reasonable person would take." *Id.* at 582-83 (quotations omitted). An appellate court will not disturb a trial court's sanction unless "it is clearly unsupported by the record." *Id.* (citation omitted).

The trial court correctly exercised its discretion. Defendants do not rebut this, instead relying on unsupported and meritless assignments of error and a vague and meritless due process argument that ignores CR 37.

B. Defendants' Assignments of Error Regarding Findings of Fact, Willfulness, and Substantial Prejudice Are Unsupported, Should Be Disregarded, and Are Meritless.

Defendants' assignments of error regarding findings of fact, willfulness, and substantial prejudice, are unsupported by argument and should be disregarded. Even if the court were to consider them, these assignments of error are meritless.

"[A] party's failure to ... provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Escude v. King Cnty. Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003); *see also Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (This court "will not

consider an inadequately briefed argument.”). Here, Defendants’ assignments of error regarding findings of fact, willfulness, and substantial prejudice are unsupported with any argument or citation to authority as required by RAP 10.3 and must, under this Court’s prior jurisprudence, be disregarded.

Moreover, even if considered, these arguments lack any merit.

1. The Trial Court Entered Findings of Fact in its Second Order Compelling Production and in its Order Granting Default Judgment.

Without any supporting argument or factual citation, Defendants baldly claim “No findings of fact were entered regarding the discovery sanction and its appropriateness.” Appellant’s Brief p.5. In addition to being unsupported by argument, this claim is provably false. The trial court in fact entered written findings twice – in its second order compelling, which suspended all of Defendants’ defenses and which was not appealed to this court, and in its default judgment. In both orders, the court expressly found (1) willful violations of its prior orders and the rules of discovery; (2) resulting substantial prejudice to Dr. La Rosa’s ability to prepare for trial; and (3) after considering lesser sanctions, whether any lesser sanction would suffice. CP 106, 237; *see Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 576, 220 P.3d 191 (2009) (Default judgment is appropriate where these are found.) In the default judgment the court

even handwrote findings that Defendants had intentionally attempted to frustrate Dr. La Rosa's efforts to seek redress in court. CP 237.

2. Defendants' Abuses Were Willful.

"A party's disregard of a court order without reasonable excuse or justification is deemed willful." *Magana*, 167 Wn. 2d 570, 584, 220 P.3d 191 (2009). Here, Defendants argue that their discovery abuses were not willful for three reasons: (1) Defendants had a busy travel schedule, an unsupported and provably false claim; (2) Defendants produced all documents in their care, custody, and control, a claim contradicted by Defendants' own discovery responses; and (3) Defendants could not pay the monetary sanctions imposed by the court. Each of these lacks any merit.

Defendants' claim that their busy travel schedule precluded production of documents is demonstrably false. Defendants were in Snohomish County, with their attorney, attending supplemental proceedings on March 12, 2013 – between the time of the first order compelling and the second. CP 118, 172, 174-178.

Defendants' second proffered justification—that they produced all of the documents in their possession, custody, and control—is also demonstrably false. In responding to a request for production, a party is required to produce all documents "which constitute or contain matters

within the scope of rule 26(b) and which are in the possession, custody or control of the responding party.” CR 34(a)(1). This includes documents which the party “has the legal right to request upon demand” and other documents to which the party has access. *Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 77-78, 265 P.3d 956 (2011).

Here, Defendants had access to far more than the meager 18 pages they produced. Among other things, as indicated above, Defendants admitted to having complaints from other purchasers (and we now know of several), but refused to produce any responsive documents. In fact, in March 2013, when Defendants were willfully disobeying the court’s first order compelling “full and complete” production, they were attending supplemental proceedings in Snohomish County Superior Court based on a judgment entered on similar claims. CP 98, 101-104. Still Defendants obstinately refused to produce any documents responsive in the face of two court orders and a third motion for default judgment.

Similarly, Defendants admitted to having a customer list and their own website contained advertising materials. Yet Defendants produced none of these documents. In light of these repeated and brazen abuses, the trial court’s finding that Defendants’ discovery abuses were willful is amply and overwhelmingly supported. For Defendants to claim otherwise to the trial court and to this Court is insulting.

Finally, in addition to incontrovertibly failing to provide documents within their care, custody, and control, Defendants have failed to show that they were actually unable to pay the sanctions imposed by the trial court. “[T]he law presumes that one is capable of performing those actions required by the court ... [and the] inability to comply is an affirmative defense.” *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725, 728 (1995) (quoting *In re King*, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988)). The burden is the noncompliant party to produce evidence of an inability to comply. *Id.* “A person fails to act as ordered by the court when he fails to take all the reasonable steps within his power to insure compliance with the court’s order.” *In re Wallace*, 490 B.R. 898, 905-908 (B.A.P. 9th Cir. 2013) (emphasis added); *Ebeh v. Tropical Sportswear Int’l Corp.*, 199 F.R.D. 696, 699 (M.D. Fla. 2001) (Mere “protestations of poverty” are not evidence that will excuse a sanctioned party’s failure to comply).

Here, Defendants have shown no effort to pay the sanctions, e.g. any efforts to obtain a loan or other funds with which to pay even the \$250 sanction. Rather, their attorney baldly states, without any support or apparent first-hand knowledge, that Defendants’ “have not paid the Court-ordered sanctions ... due to financial inability to pay.” CP 223. This is patently insufficient to rebut the presumption that Defendants have the

ability to pay but are instead continuing willfully to disobey the court's orders. Thus, even if there were any reasonable question about the completeness of Defendants' production, which there is not, Defendants also willfully disobeyed the trial court in failing to pay the sanctions arising from their repeated discovery abuses.

3. The Trial Court Correctly Found that Defendants' Failure to Answer Basic Contention Interrogatories and Requests for Production Substantially Prejudiced Dr. La Rosa's Ability to Prepare for Trial.

A party is substantially prejudiced in their ability to prepare for trial where the information withheld is "intrinsically bound up with the merits of the case." *Delany v. Canning*, 84 Wn. App. 498, 508, 929 P.2d 475 (1997) (affirming default judgment sanction). Stated differently, substantial prejudice results where the requested discovery "goes to the heart" of the plaintiff's claims and defendant's defenses. *Magana*, 167 Wn.2d at 589; *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 324, 54 P.3d 665 (2002). Substantial prejudice to the ability to prepare for trial prevents a plaintiff from "doing what the law really allows [the plaintiff] to do, and that is to follow up on leads from developed facts." *Smith*, 113 Wn. App. at 325.

Defendants' willful withholding of documents responsive to Dr. La Rosa's basic contention interrogatories and requests for production

precluded investigation of facts intrinsically bound up with the merits of his case. After more than seven months of pending discovery requests and with just two months until the discovery cutoff date, Dr. La Rosa did not have the most basic documents related to Defendants' defenses or affirmative defenses, customer lists, other claims, advertising materials, or correspondence concerning the subject matter of the lawsuit or with any other manufacturers or contractors. CP 119, 189-200. Defendants precluded Dr. La Rosa from developing any facts central to his claims.

The substantial prejudice to Dr. La Rosa is most apparent in Defendants' willful withholding of their customer list and all responsive documents regarding other claims of misrepresentation defective product performance. Discovery regarding other purchasers and their experiences are central to the most basic elements of Dr. La Rosa's CPA claim against Defendants. *See* RCW 19.86.093(3)(a) (A CPA claimant may establish that an act or practice is injurious to the public interest where it has injured other persons.). Defendants admitted that other claims exist (and we now know of several) but in deceptive and obstructionist answers did not identify any other purchasers or any other claims (whether or not they had yet become a lawsuit), and refused to produce any responsive documents, e.g. any correspondence with other purchasers or informal complaints of defective performance. Defendants' bald answer that lawsuits are public

records and that no other claims had been made is at best both and incomplete, which is the equivalent of a non-answer. CR 37(a)(3). The trial court in its discretion correctly found that Defendants' obstruction and stonewalling stymied Dr. La Rosa's ability to prepare for trial on the most basic elements of his lawsuit.

In addition, Defendants' unsupported assignment of error to this court, alleging that remand is still possible, is the same argument that was rejected by the Washington Supreme Court in *Magana*, where the defendant argued that default judgment was inappropriate, since the matter could be remanded for trial. *Magana*, 167 Wn.2d 570, 592, 220 P.3d 191 (2009) ("The test looks at preparing for trial, not having a fair trial.")² Here, Dr. La Rosa was substantially prejudiced in his ability to prepare for trial, where for more than seven months he was unable to obtain even the most basic discovery essential to his claims. Moreover, because Defendants have failed to pay for Dr. La Rosa's fees in moving,

² This is not the first time Defendants have ignored or misconstrued *Magana*. In opposing entry of default judgment, Defendants relied exclusively on *Hyundai Motor Am. v. Magana*, 141 Wn. App. 495, 170 P.3d 1165 (2007), the Court of Appeals' decision that was flatly reversed by the Supreme Court. CP 113, 219-220. Now Defendants represent to this court that Judge Bridgewater's dissent to the Court of Appeals' decision supports their argument. Appellant's Brief 13. In fact, Judge Bridgewater's dissent directly contradicts Defendants' argument. 114 Wn. App. at 524-542 ("[T]he question, of course, is not whether we would have dismissed the action; it is whether the trial court abused its discretion in so doing. ... I would find that the trial court was well within its discretion to grant the default judgment.")

repeatedly, to compel discovery answers, a remand would reward Defendants and punish Dr. La Rosa for Defendants' repeated and willful disregard of the trial court's orders. This would be contrary to the rules governing discovery sanctions, which provide that sanctions "should insure that the wrongdoer does not profit from the wrong" and that the purposes of sanctions are "to deter, punish, compensate, and educate." *Magana*, 162 Wn.2d at 584, 590.

4. Default Judgment Was Appropriate.

Defendants' bald statement that "lesser sanctions such as the exclusion of evidence would be the appropriate sanction for this discovery non-compliance" lacks any merit for several reasons. Appellant's Brief 16. This statement is unsupported with argument and should be disregarded. In addition, exclusion of evidence would make no sense here where, Defendants' discovery abuses already serve to exclude evidence by the failure to provide any meaningful documentation in discovery.

More generally, CR 37(b) and (d) expressly authorize default judgment, and the appropriate sanction is trusted to the trial court's broad discretion, which will only be disturbed where there has been a "clear abuse of discretion." *Magana*, 167 Wn.2d at 582. Here, the trial court

(Bridgewater, J. dissenting). Dr. La Rosa respectfully requests this Court review the dissent's reasoning, which was adopted by our Supreme Court.

found that lesser sanctions would not suffice after repeatedly trying lesser sanctions – even suspending all of Defendants’ defenses – without success. It was only after Defendants willfully failed to comply with two orders compelling and incremental sanctions that the trial court entered default judgment. CP 237.

This Court should not disturb the trial court’s decision. Appellate courts routinely affirm default judgment sanctions where, after the court enters an order compelling discovery answers, the defendant persists in failing to cure the same discovery violation. *See, e.g., RCL NW., Inc. v. Colo. Res., Inc.*, 72 Wn. App. 265, 272, 864 P.2d 12 (1993) (affirming default judgment sanction where court entered order compelling and “despite being threatened with . . . default judgment” the defendant still refused to answer same discovery request); *Delany v. Canning*, 84 Wn. App. 498, 508, 929 P.2d 475 (1997) (affirming default judgment sanction where the court was “[f]aced with [the] intransigence” of a defendant who failed to comply with first court order compelling complete answers to interrogatories and noting the defendant’s “stone walling, foot dragging, and obfuscation from beginning to end”). In fact, Dr. La Rosa has located no case reversing a default judgment sanction where the defendant willfully disregarded two previous orders compelling the same

production and persisted in this disregard in the face of a motion for default judgment.

C. The Trial Court's Findings of Willfulness and Substantial Prejudice Vitiates Defendants' Due Process Argument.

Defendants argument they have been denied due process lacks merit and ignores controlling case law. "Due process is satisfied . . . if, before entering a default judgment or dismissing a claim or defense, the trial court concludes that there was 'a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial.'" *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 330, 54 P.3d 665, 678 (2002) (citation omitted). The rationale is that "due process is secured by a presumption that the refusal to produce evidence material to the administration of justice is an admission of the absence of any merit in the asserted defenses." *Associated Mortg. Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 228, 548 P.2d 558 (1976).

Here, as discussed above and as found by the trial court, Defendants willfully disobeyed the trial court's two orders compelling, resulting in substantial prejudice to Dr. La Rosa. Defendants' due process argument lacks any merit, particularly where Defendants had more than seven months to produce the requested discovery. Twice the trial court

found that Defendants willfully violated the orders compelling discovery, and twice the trial court found that the violation substantially prejudiced Dr. La Rosa's ability to prepare for trial. Defendants had abundant opportunities to correct their discovery abuses but intentionally failed to do so.

D. This Court Should Award Dr. La Rosa His Reasonable Attorney Fees on Appeal.

This Court should award Dr. La Rosa his reasonable attorney fees on appeal. "Attorneys' fees on appeal are recoverable under the Consumer Protection Act to a successful plaintiff." *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 856, 792 P.2d 142 (1990); RCW 19.86.090; RAP 18.1. Attorney fees may also be awarded on appeal under CR 37(d), where the appellate court affirms default judgment. *Magana*, 167 Wn. 2d at 593; CR 37(d); RAP 18.1.

Here, Dr. La Rosa brought a Consumer Protection Act claim, which was frustrated by Defendants' willful and repeated discovery abuses. The trial court awarded fees based on those abuses in a carefully considered order. CP 276-78. Given these abuses and the underlying CPA claim, this Court should likewise award Dr. La Rosa his reasonable fees and costs incurred on appeal.

VI. CONCLUSION

Dr. La Rosa requested documents that unquestionably exist and are in Defendants' care, custody, and control. Yet over a period of more than seven months, Defendants refused to produce these documents and even in the face of two court orders compelling full and complete responses and a motion for default, failed to cure the discovery violation and instead responded with repeated, demonstrably false excuses. Confronted with Defendants' intransigence, the court entered a sanction expressly authorized and contemplated by the court rules, which Defendants ignore. The trial court correctly exercised its discretion, and the record fully supports the court's findings. Defendants' brief to this Court is unsupported and frivolous. Dr. La Rosa requests this Court affirm the judgment of the trial court and award his reasonable attorney fees.

RESPECTFULLY SUBMITTED this 6 day of March, 2014.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the date written below, I sent for service by legal messenger and by email a true and correct copy of Brief of Respondent addressed to:

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DATED this 6th day of March, 2014, at Seattle, Washington.



Karen L. Baril